An Address
on the
Life, Character, and Influence
of
Chief Justice Marshall
—
Gray

AN

ADDRESS

ON THE

LIFE CHARACTER AND INFLUENCE

OF

CHIEF JUSTICE MARSHALL

DELIVERED AT RICHMOND ON THE FOURTH DAY OF FEBRUARY 1901
AT THE REQUEST OF THE STATE BAR ASSOCIATION OF
VIRGINIA AND THE BAR ASSOCIATION OF
THE CITY OF RICHMOND

BY

HORACE GRAY

WASHINGTON
PEARSON PRINTING OFFICE
1901

ADDRESS.

Gentlemen of the Bar of the Commonwealth
of Virginia, and of the City of Richmond:

One hundred years ago to-day, the Supreme Court of the United States, after sitting for a few years in Philadelphia, met for the first time in Washington, the permanent capital of the Nation; and John Marshall, a citizen of Virginia, having his home in Richmond, and a member of this bar, took his seat as Chief Justice of the United States.

In inviting a citizen of another ancient Commonwealth to take part in your commemoration of that epoch in our national history, by addressing you on the Life, Character and Influence of Chief Justice Marshall, you have been pleased to mention that it was President John Adams, of Massachusetts, who gave Chief Justice Marshall to the Nation, and that I am a citizen of Massachusetts and a member of the court over which Chief Justice Marshall presided; and to refer to the most cordial relations formerly existing between your State and my own, now happily restored, and, as we all trust, being reëstablished in a closer degree.

Heartily reciprocating your kindly sentiments, and deeply touched in my inmost feelings and convictions, your invitation has had the force of a summons that could not be gainsaid.

Permit me, in this connection, to recall one or two allusions by Marshall himself to the sympathy which existed between Virginia and Massachusetts in the trying times of the Revolutionary War and of the Continental Congress.

In the earliest known speech of his, (as described by a kinsman who heard it,) made in May, 1775, when he was under twenty years old, upon assuming command as lieutenant of a company of the Virginia militia, he told his men "that he had come to meet them as fellow-soldiers, who were likely to be called on to defend their country, and their own rights and liberties invaded by the British; that there had been a battle at Lexington in Massachusetts, between the British and Americans, in which the Americans were victorious, but that more fighting was expected; that soldiers were called for, and that it was time to brighten their fire-arms, and learn to use them in the field."

Many years afterwards, in a letter to a friend, (quoted by Mr. Justice Story, to whom it was perhaps addressed,) he wrote: "When I recollect the wild and enthusiastic notions with which my political opinions of that day were tinctured, I am disposed to ascribe my devotion to the Union, and to a government competent to its preservation, at least as much to casual circumstances, as to judgment. I had grown up at a time when the love of the Union, and the resistance to the claims of Great Britain, were the inseparable inmates of the same bosom; when patriotism and a strong fellow-feeling with our suffering fellow-citizens of Boston were identical; when the maxim, 'United we stand; divided we fall,' was the maxim of every orthodox American. And I had imbibed these sentiments so thoroughly, that they constituted a part of my being. I carried them with me into the army, where I found myself associated with brave men from different States, who were risking life and everything valuable in a common cause, believed by all to be most precious; and where I was confirmed in the habit of considering America as my country, and Congress as my government."

Before the adoption of the Constitution, one of the chief defects in the government of the United States

was the want of a national judiciary, of which there was no trace other than in the tribunals constituted by the Continental Congress, under powers specifically conferred by the Articles of Confederation, for the decision of prize causes, or of controversies between two or more States.

Among the objects of the Constitution, as declared in the preamble, the foremost, next after the paramount aim "to form a more perfect Union," is to "establish justice." It ordains that the judicial power of the United States shall be vested in "one Supreme Court," and in such inferior courts as Congress may from time to time establish; that the judicial power shall extend to "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," and to other classes of cases specified; that the Supreme Court, in cases affecting ambassadors, public ministers and consuls, or to which a State shall be party, shall have original jurisdiction; and, in all the other cases before mentioned, shall have appellate jurisdiction, with such exceptions and under such regulations as Congress shall make; and that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

On the 24th of September, 1789, the first Congress under the Constitution passed the Judiciary Act, which had been framed by Oliver Ellsworth, then a Senator from Connecticut. That act has always been regarded as a contemporaneous construction of the Constitution; and, with some modifications, remains to this day the foundation of the jurisdiction and practice of the courts of the United States. It provided that the Supreme Court should consist of a Chief Justice, and of five Associate Justices who should

have precedence according to the date of their commissions; established the Circuit and District Courts; defined the jurisdiction, original and appellate, of all the Federal courts; and empowered the Supreme Court to reëxamine and reverse or affirm, on writ of error, any final judgment or decree, rendered by the highest court of a State in which a decision in the case could be had, against a right claimed under the Constitution, laws or treaties of the United States.

President Washington, on the very day of his approval of that act, nominated John Jay, of New York, as Chief Justice; and John Rutledge, of South Carolina, William Cushing, of Massachusetts, Robert H. Harrison, of Maryland, James Wilson, of Pennsylvania, and John Blair, of Virginia, as Associate Justices of the Supreme Court; and the nominations were all confirmed by the Senate on the 26th of September. The commissions of Chief Justice Jay and of Mr. Justice Rutledge were dated on that day, and those of the other Justices on successive days, in the order above named, thus determining their precedence. President Washington, in a letter to each of the Associate Justices, informing him of his appointment, remarked, "Considering the judicial system as the chief pillar upon which our National Government must rest;" and in a letter to the Chief Justice, enclosing his commission, said that the judicial department "must be considered as the keystone of our political fabric."

During the first twelve years of the Supreme Court, there were frequent changes in its membership: three by the appointees preferring high offices in the governments of their several States; three others by resignation; one by rejection by the Senate; and two by death.

Rutledge never sat in the Supreme Court as Associate Justice, and in 1791 resigned the office to accept that of Chief Justice of South Carolina. Harrison declined his appointment, preferring to become Chancellor of Maryland. James Iredell, of North Carolina, was appointed

in 1790, in the stead of Harrison; and Thomas Johnson, of Maryland, in 1791, in the place of Rutledge. The other Associate Justices before 1801 were two appointed by President Washington: William Paterson, of New Jersey, in 1793, in the place of Thomas Johnson, resigned; and Samuel Chase, of Maryland, in 1796, upon the resignation of Blair; and two appointed by President John Adams: Bushrod Washington, of Virginia, in 1798, upon the death of Wilson; and Alfred Moore, of North Carolina, in 1799, upon the death of Iredell.

President Washington, in his eight years of office, appointed four Chief Justices of the United States; John Jay in 1789; John Rutledge in 1795; William Cushing and Oliver Ellsworth in 1796. Jay held the office for about five years and nine months; and for the first six months of that time, by the President's request, also acted as Secretary of State. Ellsworth held the office of Chief Justice a little more than four years and a half. But Jay, as well as Ellsworth, during the whole of his last year, ceased to perform his judicial duties, by reason of being employed on a diplomatic mission abroad. Rutledge, after sitting as Chief Justice for a single term, was rejected by the Senate; and Cushing, though confirmed by the Senate, declined the appointment, and remained an Associate Justice until his death in 1810. Ellsworth resigned in 1800, owing to ill health; and Jay resigned in 1795 to accept the office of Governor of the State of New York, and in 1800, towards the close of his second term of office as Governor, being in a depressed condition of health and spirits, and having finally determined to retire from public life, declined a reappointment as Chief Justice, offered him by President Adams on the resignation of Ellsworth.

John Marshall, then Secretary of State, was nominated as Chief Justice of the United States by President Adams on the 20th, confirmed by the Senate on the 27th, and commissioned on the 31st of January, 1801.

His characteristic letter of acceptance, addressed to the President, and dated February 4th, 1801, was in these words:

"Sir: I pray you to accept my grateful acknowledgments for the honor conferred on me in appointing me Chief Justice of the United States.

"This additional and flattering mark of your good opinion has made an impression on my mind which time will not efface.

"I shall enter immediately on the duties of the office, and hope never to give you occasion to regret having made this appointment.

"With the most respectful attachment,

"I am, Sir,

"Your obedient servant,

"J. MARSHALL."

On the same day, as is stated on the record of the Supreme Court, his commission as Chief Justice, "bearing date the 31st day of January, A. D. 1801, and of the Independence of the United States the twenty-fifth," was "read in open Court, and the said John Marshall, having taken the oaths prescribed by law, took his seat upon the Bench."

In speaking of one who has been for a hundred years the central and predominant figure in American jurisprudence, little more can be expected, at this day, than to echo what has been better said by others. Almost the whole ground was covered, long ago, by Mr. Binney, in the admirable eulogy delivered before the Councils of the City of Philadelphia on the 24th of September, 1835, the eightieth anniversary of the Chief Justice's birth, and within three months after his death; and by Mr. Justice Story, in the interesting essay, first published in the North American Review in 1828, and again, with some changes, in the American National Portrait Gallery in 1833, and finally developed into his discourse before the Suffolk

Bar on the 15th of October, 1835, and containing much information derived from the Chief Justice himself.

In the researches incited by your invitation, my first and most important discovery was a letter from Chief Justice Marshall, dated "Richmond, March 22d, 1818," and addressed to "Joseph Delaplaine, Esq., Philadelphia." Delaplaine was then publishing, in numbers, his Repository of the Lives and Portraits of Distinguished American Characters, which was discontinued soon afterwards, without ever including Marshall. The letter purports to have been written in answer to one "requesting some account of my birth, parentage, &c.," and contains a short autobiography.

My earliest knowledge of the existence of such an autobiography was obtained from a thin pamphlet, published at Columbus, Ohio, in 1848; found in an old bookstore in Boston; and containing (besides Marshall's famous speech in Congress on the case of Jonathan Robbins) only this letter, entitling it "Autobiography of John Marshall." The internal evidence of its genuineness is very strong; and its authenticity is put almost beyond doubt by a facsimile (recently shown me in your State Library) of a folio sheet in Marshall's handwriting, which, although it contains neither the whole of the letter, nor its address, bears the same date, and does contain the principal paragraph of the letter, word for word, with the corrections of the original manuscript, and immediately followed by his signature.

An autobiography of Marshall is of so much interest, that no apology is necessary for quoting it in full. Except for one or two slips of the pen, corrected in the printed pamphlet, it is as follows:

"I was born on the 24th of September, 1755, in the county of Fauquier in Virginia. My father, Thomas Marshall, was the eldest son of John Marshall, who intermarried with a Miss Markham, and whose parents migrated from Wales, and settled in the county of West-

moreland in Virginia, where my father was born. My mother was named Mary Keith; she was the daughter of a clergyman of the name of Keith who migrated from Scotland, and intermarried with a Miss Randolph on James River. I was educated at home, under the direction of my father, who was a planter, but was often called from home as a surveyor. From my infancy I was destined for the bar; but the contest between the mother country and her colonies drew me from my studies and my father from the superintendence of them; and in September, 1775, I entered into the service as a subaltern. I continued in the army until the year 1781, when, being without a command, I resigned my commission, in the interval between the invasions of Virginia by Arnold and Phillips. In the year 1782, I was elected into the legislature of Virginia; and in the fall session of the same year, was chosen a member of the executive council of that State. In January, 1783, I intermarried with Mary Willis Ambler, the second daughter of Mr. Jacquelin Ambler, then treasurer of Virginia, who was the third son of Mr. Richard Ambler, a gentleman who had migrated from England, and settled at Yorktown in Virginia. In April, 1784, I resigned my seat in the executive council, and came to the bar, at which I continued, declining any other public office than a seat in the legislature, until the year 1797, when I was associated with General Pinckney and Mr. Gerry in a mission to France. In 1798, I returned to the United States; and in the spring of 1799 was elected a member of Congress, a candidate for which, much against my inclination, I was induced to become by the request of General Washington. At the close of the first session, I was nominated, first to the Department of War, and afterwards to that of State, which last office I accepted, and in which I continued until the beginning of the year 1801, when Mr. Ellsworth having resigned, and Mr. Jay having declined his appointment, I was nominated to the office of Chief Justice, which I still hold.

"I am the oldest of fifteen children, all of whom lived to be married, and of whom nine are now living. My father died when about seventy-four years of age; and my mother, who survived him about seven years, died about the same age. I do not recollect all the societies to which I belong, though they are very numerous. I have written no book, except the Life of Washington, which was executed with so much precipitation as to require much correction."

This brief outline of an autobiography, besides its intrinsic value as a whole, is notable in several particulars. It shows that John Marshall was of Welsh, and of Scotch, as well as of English descent; and this through persons who had not recently come over, but had all been in this country long enough to become truly Americans. It attests, over his own hand, that he was educated at home under his father's superintendence and direction, and was destined from infancy for the bar; and also that it was by the request of General Washington, and much against his own inclination, that he was induced to become a candidate for Congress.

Marshall passed his boyhood and early youth in the country, in a healthful climate and beautiful scenery, fond of field sports and athletic exercises, living in a house containing a good English library, the eldest of a large family of children, under the guidance and in the companionship of a father of strong natural abilities, and to whom, as he used to say, he owed the solid foundation of all his own success in life. As Mr. Binney says: "It is the praise and the evidence of the native powers of his mind, that by domestic instruction, and two years of grammatical and classical tuition obtained from other sources, Mr. Marshall wrought out in after life a comprehensive mass of learning both useful and elegant, which accomplished him for every station that he filled, and he filled the highest of more than one description."

He was licensed to practice law in 1780, and soon

became one of the leaders of the bar of Virginia. The Reports of Bushrod Washington and of Daniel Call show that hardly any one argued so many cases before the Court of Appeals of the State.

He was chosen in the spring of 1782 a representative in the legislature of Virginia, and in the fall of the same year a member of the executive council of the State. He also served in the legislature in the years 1784, 1787 to 1792 and 1795.

In the convention of Virginia of 1788 upon the adoption of the Constitution of the United States, Patrick Henry, George Mason and William Grayson were the principal opponents of the Constitution, and James Madison, Governor Randolph, George Nicholas, Edmund Pendleton and John Marshall its leading supporters; and at the close of its proceedings Marshall (then only thirty-three years of age) was made a member, both of the committee to report a form of ratification, and of the committee to report such amendments as by them should be deemed necessary to be recommended; and the only other persons who were on both committees were Randolph, Nicholas and Madison.

Patrick Henry said of him in that convention: "I have the highest veneration and respect for the honorable gentleman; and I have experienced his candour upon all occasions." And ten years after, when Marshall was a candidate for Congress, it being represented that Henry was opposed to him, he wrote and published a letter saying that he should give him his vote for Congress preferably to any citizen of the State, General Washington only excepted.

President Washington offered Marshall the District-Attorneyship for the District of Virginia in 1789, and the Attorney-Generalship, and the mission to France, in 1796. President Adams offered him the office of Associate Justice of the Supreme Court in 1798, upon the death of Mr. Justice Wilson, and before appointing Bushrod Washington.

In 1799, Marshall delivered in the House of Representatives the speech vindicating the right and the duty of the President to surrender Jonathan Robbins to the British Government for trial for a murder on a British ship, of which Mr. Binney justly says, that it has all the merits, and nearly all the weight of a judicial sentence; and Mr. Justice Story, that it placed him at once in the front rank of constitutional statesmen, and settled then, and forever, the points of national law upon which the controversy hinged.

Mr. Wirt, himself eminent as a lawyer and as an orator, who began the practice of the law but ten years later than Marshall, and who knew him well, both at the bar and on the bench, was so impressed with his style of argument, that he returned to it again and again in his letters, which are the more interesting because of the absolute contrast between the two men in that respect.

In the Letters of a British Spy, first published in 1803, speaking of Marshall at the bar, Mr. Wirt said: "This extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of an orator, deserves to be considered as one of the most eloquent men in the world; if eloquence may be said to consist in the power of seizing the attention with irresistible force, and never permitting it to elude the grasp until the hearer has received the conviction which the speaker intends." "He possesses one original, and almost supernatural faculty: the faculty of developing a subject by a single glance of his mind, and detecting, at once, the very point on which every controversy depends. No matter what the question; though ten times more knotty than 'the gnarled oak,' the lightning of heaven is not more rapid, nor more resistless, than his astonishing penetration. Nor does the exercise of it seem to cost him an effort. On the contrary, it is as easy as vision. I am persuaded that his eyes do not fly over a landscape, and take in its various objects with more

promptitude and facility, than his mind embraces and analyzes the most complex subject. Possessing this intellectual elevation which enables him to look down and comprehend the whole ground at once, he determines immediately, and without difficulty, on which side the question may be most advantageously approached and assailed. In a bad cause, his art consists in laying his premises so remotely from the point directly in debate, or else in terms so general and so specious, that the hearer, seeing no consequence which can be drawn from them, is just as willing to admit them as not; but his premises once admitted, the demonstration, however distant, follows as certainly, as cogently, as inevitably, as any demonstration in Euclid. All his eloquence consists in the apparently deep self-conviction and emphatic earnestness of his manner; the correspondent simplicity and energy of his style; the close and logical connection of his thoughts; and the easy gradations by which he opens his lights on the attentive minds of his hearers."

Again, in a letter of May 6th, 1806, to Benjamin Edwards, a friend of his youth, Mr. Wirt wrote: "Here is John Marshall, whose mind seems to be little else than a mountain of barren stupendous rocks, an inexhaustible quarry from which he draws his materials and builds his fabrics, rude and gothic, but of such strength that neither time nor force can beat them down; a fellow who would not turn off a single step from the right line of his argument, though a paradise should rise to tempt him."

Once more, on December 20th, 1833, within two months of his own death, in a letter of advice to a law student, he wrote: "Learn (I repeat it) *to think—to think deeply, comprehensively, powerfully*—and learn the simple, nervous language which is appropriate to that kind of thinking. Read the legal and political arguments of Chief Justice Marshall, and those of Alexander Hamilton, which are coming out. Read them, *study them;* and observe with what an omnipotent sweep of thought they range over the

whole field of every subject they take in hand—and that with a scythe so ample and so keen, that not a straw is left standing behind them."

Before Marshall became Chief Justice, very few cases of constitutional law were decided by the Supreme Court.

The most important one was the case of Chisholm against the State of Georgia, in which it was held in 1793, by Chief Justice Jay and his associates, Mr. Justice Iredell dissenting, that the Supreme Court had original jurisdiction of an action brought against a State by a citizen of another State. That decision proceeded upon the ground that such was the effect of the Constitution, established by the people in their sovereign capacity. But it was inconsistent with the view which had been maintained by Marshall in the Virginia convention of 1788; and it was presently, as the Supreme Court has since said, reversed and overruled by the people themselves, in the Eleventh Amendment of the Constitution, which declared that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Two cases from the Virginia Circuit were argued at Philadelphia, in February, 1796, before Justices Cushing, Wilson, Paterson and Chase, just before the appointment of Chief Justice Ellsworth. In one of them, Ware against Hylton, the case of the British debts, Marshall was of counsel against the debts, and the court held them to be protected by the treaty of peace. In the other, Hylton against the United States, in which the court upheld the constitutionality of the carriage tax, Marshall is said by Judge Tucker to have been of counsel against the tax in the Circuit Court; and Mr. Wirt, in a letter to Francis W. Gilmer of November 2d, 1818, more than twenty years after, spoke of Marshall as having argued this case in Philadelphia; but Mr. Wirt probably had in mind the case of the British debts.

John Marshall was Chief Justice of the United States for more than thirty-four years, from his taking the oath of office on February 4th, 1801, to his death on July 6th, 1835.

After his accession, the changes in the membership of the Supreme Court became much less frequent than they had been during the earlier years of the court. Of the Associate Justices on the bench at the time of his appointment, Moore continued to serve for three years; Paterson for nearly five years; Cushing and Chase for nearly eleven years; and Bushrod Washington for nearly twenty-nine years. William Johnson, appointed on the resignation of Moore in 1804, served thirty years, dying within a year before Chief Justice Marshall; Livingston, appointed on the death of Paterson in 1806, served sixteen years; Todd, appointed in 1807, (under an act of Congress increasing the number of Associate Justices to six,) nineteen years; and Duvall, appointed in 1811, on the death of Chase, twenty-three years, resigning in January, 1835. Story, also appointed in 1811, on the death of Cushing, served nearly thirty-four years; and Thompson, appointed in 1823, on the death of Livingston, twenty years. Trimble, appointed in 1826, on the death of Todd, died in little more than two years; and McLean, appointed in his place in 1829, served thirty-two years. Justices Story, Thompson and McLean remained on the bench at the time of Chief Justice Marshall's death. The other Associate Justices at that time were Baldwin, appointed in 1830, on the death of Bushrod Washington; and Wayne, appointed January 5th, 1835, in the place of William Johnson.

Chief Justice Marshall's conduct in regard to the appointment of some of his associates is worthy of mention.

On the death of Mr. Justice Trimble in 1828, President John Quincy Adams offered his place to Henry Clay, who declined it, and (as Mr. Adams states in his diary) " read me a letter from Chief Justice Marshall, speaking very favorably of J. J. Crittenden to fill the office of Judge of

the Supreme Court, but declining to write to me." Crittenden was nominated by President Adams, but was not confirmed by the Senate.

In January, 1835, upon the resignation of Mr. Justice Duvall, President Jackson nominated Roger B. Taney as Associate Justice in his place. While the nomination was pending before the Senate, Chief Justice Marshall wrote a note to Mr. Leigh, then a Senator from Virginia, in these terms: "If you have not made up your mind on the nomination of Mr. Taney, I have received some information in his favor which I would wish to communicate." Taney's nomination as Associate Justice was indefinitely postponed by the Senate; but within a year afterwards, upon the death of Chief Justice Marshall, he was nominated and confirmed as Chief Justice of the United States.

Before Marshall's appointment, the practice appears to have been for all the justices to deliver their opinions *seriatim*—a practice which tends to bring into prominence the subordinate points of view in which they differ, and to obscure the principal point on which they agree; and, while it sometimes makes the report of the case more interesting, tends to impair its weight as a precedent for the determination of future controversies. Under Marshall, all subordinate differences seem to have been settled in conference, or at any rate less often displayed to the public; and the opinion of the court was usually delivered by one justice, and in the majority of important, and especially of constitutional cases, by Marshall himself. During his time there were few dissenting opinions.

The only constitutional case in which Chief Justice Marshall dissented from the judgment of the court was Ogden against Saunders in 1827, which was decided by a bare majority of the court against the opinion of Marshall, Duvall and Story. But in Boyle against Zacharie in 1832, notwithstanding a change in the membership of the court, Marshall declared that the principles estab-

lished in the former opinion were to be considered no longer open for controversy.

Chief Justice Marshall, as appears by letters from him to his associates on April 18th, 1802, was originally of opinion that the Justices of the Supreme Court could not hold Circuit Courts without distinct commissions as circuit judges. But in Stuart against Laird in 1803, apparently deferring to the opinions of his associates, he acted as circuit judge; and the Supreme Court, in an opinion delivered by Mr. Justice Paterson, affirmed his judgment, upon the ground that practice and acquiescence for several years, commencing with the organization of the judicial system, had fixed the construction beyond dispute.

Marshall's judicial demeanor is best stated in the words of an eye-witness. Mr. Binney, who had been admitted to the bar of the Supreme Court in 1809, and who had often practised before him, tells us:

"He was endued by nature with a patience that was never surpassed—patience to hear that which he knew already, that which he disapproved, that which questioned himself. When he ceased to hear, it was not because his patience was exhausted, but because it ceased to be a virtue.

"His carriage in the discharge of his judicial business was faultless. Whether the argument was animated or dull, instructive or superficial, the regard of his expressive eye was an assurance that nothing that ought to affect the cause was lost by inattention or indifference; and the courtesy of his general manner was only so far restrained on the bench, as was necessary for the dignity of office, and for the suppression of familiarity.

"His industry and powers of labor, when contemplated in connection with his social temper, show a facility that does not generally belong to parts of such strength."

"To qualities such as these, he joined an immovable firmness befitting the office of presiding judge in the highest tribunal of the country. It was not the result of

excited feeling, and consequently never rose or fell with the emotions of the day. It was the constitution of his nature, and sprung from the composure of a mind undisturbed by doubt, and of a heart unsusceptible of fear."

"In him his country have seen that triple union of lawyer, statesman, and patriot, which completes the frame of a great constitutional judge."

He had not the technical learning in the common law of Coke, or of several of Coke's successors. But, in the felicitous words of Mr. Justice Story, "he seized, as it were by intuition, the very spirit of juridical doctrines, though cased up in the armor of centuries; and he discussed authorities, as if the very minds of the judges themselves stood disembodied before him."

He had not the learning of Nottingham or of Hardwicke in the jurisdiction and practice of the court of chancery, or of Mansfield in the general maritime law. But his judgments show that he was a master of the principles of equity, and of commercial law.

He had not the elegant scholarship of Stowell. But it is not too much to say that his judgments in prize causes exhibit a broader and more truly international view of the law of prize. Upon the question of the exemption of ships of war and some other ships, it was observed by Lord Justice Brett in the English Court of Appeal in 1880, "the first case to be carefully considered is, and always will be, The Exchange," decided by Chief Justice Marshall in 1812.

The jurisdiction of the court over which he presided was not confined to one department or branch of the law; it included common law, equity, maritime law, the law of admiralty and prize, and, in some degree, the civil law of Spain and of France.

Beyond all this, the jurisdiction of his court extended to constitutional law, in a more comprehensive sense than ever belonged to the courts of any other country.

In England, there is no law of higher sanction than an act of Parliament; and Parliament has uncontrolled power to change or to repeal even Magna Charta. It is otherwise in this country.

One of the earliest and most important judgments of Marshall is Marbury against Madison, decided in 1803, in which the paramount obligation of the Constitution over all ordinary statutes was declared and established by a course of reasoning which may be indicated by a few extracts from the opinion.

"The Constitution is either a superior paramount law, unchangeable by ordinary means; or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society."

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must

determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

"The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that *courts*, as well as other departments, are bound by that instrument."

In the light of experience, it is curious to look back upon the doubt and apprehension entertained by some of the Northern Federalists with regard to Marshall shortly before he became Chief Justice. For instance, on the 29th of December, 1799, when he had just entered the House of Representatives, Oliver Wolcott, then Secretary of the Treasury under President Adams, wrote to Fisher Ames: "He is doubtless a man of virtue and distinguished talents; but he will think much of the State of Virginia, and is too much disposed to govern the world according to rules of logic; he will read and expound the Constitution as if it were a penal statute, and will sometimes be embarrassed with doubts of which his friends will not perceive the importance."

Why should he not "think much of the State of Virginia?" What State of the Union had produced such a galaxy of great men? And what American, worthy of the name, does not cherish a peculiar affection for the State of his birth and his home? But such an affection for one's own State is by no means incompatible with a paramount allegiance and devotion to the United States as one's country. There is no more striking illustration of this truth than Chief Justice Marshall himself.

It was upon writs of error to the highest court of Virginia in which a decision in the case could be had—at first

in 1816, in the case of Martin against Hunter's Lessee, a case between private individuals; and afterwards in 1821, in the case of Cohens against Virginia, a criminal prosecution instituted by the State—that the Supreme Court, under the lead of Chief Justice Marshall, upheld and established its appellate jurisdiction, under the Constitution and the Judiciary Act, to review the judgment of the State court against a right claimed under the Constitution or the laws of the United States. In the first case, indeed, perhaps because it came from his own State, he allowed Mr. Justice Story to draw up the opinion of the court. But in the second case he himself expressed the unanimous conclusion of the court in one of his most elaborate and most powerful judgments.

The idea that he would "read and expound the Constitution as if it were a penal statute" seems now almost ludicrous. Take, for instance, his judgments in the cases of McCulloch against Maryland in 1819, and of Wiltberger in 1820. In Wiltberger's case, he clearly stated the reasons and the limits of the rule that penal statutes are to be construed strictly. But in McCulloch's case, when dealing with the question what powers may be implied from the express grants to Congress in the Constitution, he said: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could hardly be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first

article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is *a constitution* we are expounding."

In McCulloch's case, after full discussion, he thus defined the rule: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Among his other greatest judgments are United States against Peters, on the sanctity of judgments of the courts of the United States; Fletcher against Peck, and Dartmouth College against Woodward, that a grant by a State is a contract, the obligation of which cannot afterwards be impaired; Gibbons against Ogden, and Brown against Maryland, on the paramount nature of the power of Congress to regulate commerce with foreign nations and among the several States; Sturges against Crowninshield, on the power of the States to pass insolvent laws; and Osborn against the Bank of the United States, on the subject of suits by the Bank of the United States.

But he gave due weight to the decisions of the courts of the several States, saying, in Elmendorf against Taylor: "This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws or treaties of the United States."

In the cases of Bollman and Swartwout in the Supreme Court, and in the trial of Aaron Burr in this Circuit, he set bounds to the doctrine of constructive treasons. As showing the pains taken by the Chief Justice, it may be interesting to note, what is not generally known, that on June 29th, 1807, after the indictments had been found against Burr and others, and more than a month before the trial, he wrote letters to each of his associates, asking their opinions upon questions of law that would arise, and saying: "I am aware of the unwillingness with which a judge will commit himself by an opinion on a case not

before him, and on which he has heard no argument. Could this case be readily carried into the Supreme Court, I would not ask an opinion in its present stage. But these questions must be decided by the judges separately on their respective circuits, and I am sure there would be a strong and general repugnance to giving contradictory decisions on the same points. Such a circumstance would be disreputable to the judges themselves, as well as to our judicial system. This consideration suggests the propriety of a consultation on new and difficult subjects, and will, I trust, apologize for this letter."

His letters to Mr. Justice Story show that he often consulted him on admiralty cases pending in the Circuit Court.

One is apt to forget that Mr. Justice Story was originally a Democrat, and was appointed to the court by James Madison, a Democratic President. He soon became a devoted adherent of Chief Justice Marshall, and fully recognized his leadership.

In an article in the North American Review in 1828, he wrote: "We resume the subject of the constitutional labors of Chief Justice Marshall. We emphatically say, of Chief Justice Marshall; for though we would not be unjust to those learned gentlemen who have from time to time been his associates on the bench, we are quite sure that they would be ready to admit, what the public universally believe, that his master mind has presided in their deliberations, and given to the results a cogency of reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration, and an elevation and comprehensiveness of conclusion, to which none others offer a parallel. Few decisions upon constitutional questions have been made, in which he has not delivered the opinion of the court; and in these few, the duty devolved upon others to their own regret, either because he did not sit in the cause, or from motives of delicacy abstained from taking an active part."

Five years later, in dedicating his Commentaries on the Constitution of the United States to Chief Justice Marshall, Mr. Justice Story said: "When I look back upon your judicial labors during a period of thirty-two years, it is difficult to suppress astonishment at their extent and variety, and at the exact learning, the profound reasoning and the solid principles which they everywhere display. Other judges have attained an elevated reputation by similar labors, in a single department of jurisprudence. But in one department, (it need scarcely be said that I allude to that of constitutional law,) the common consent of your countrymen has admitted you to stand without a rival. Posterity will assuredly confirm, by its deliberate award, what the present age has approved as an act of undisputed justice."

Upon two important points in which decisions made in Chief Justice Marshall's time have been since overruled, the later decisions are in accord with the opinions which he finally entertained.

The court, in 1809, in opinions delivered by him, decided that a corporation aggregate could not be a citizen; and could not litigate in the courts of the United States, unless in consequence of the character of its members, appearing by proper averments upon the record. In Louisville Railroad Company against Letson, in 1844, those decisions were overruled; and it appears by the opinion of the court, as well as by a letter from Mr. Justice Story to Chancellor Kent of August 31st, 1844, that Chief Justice Marshall had become satisfied that the early decisions were wrong.

In the case of The Thomas Jefferson, in 1825, it was decided by a unanimous opinion of the court, delivered by Mr. Justice Story, that the jurisdiction of the courts of admiralty of the United States was limited by the ebb and flow of the tide. But an article published in the New York Review for October, 1838, by one who was evidently intimate with Chief Justice Marshall, tells

us: "He said, (and he spoke of it as one of the most deliberate opinions of his life,) at a comparatively late period, that he had always been of opinion that we in America had misapplied the principle upon which the admiralty jurisdiction depended—that in England the common expression was, that the admiralty jurisdiction extended only on tide waters, and as far as the tide ebbed and flowed; and this was a natural and reasonable exposition of the jurisdiction in England, where the rivers were very short, and none of them navigable from the sea beyond the ebb and flow of the tide—that such a narrow interpretation was wholly inapplicable to the great rivers of America; that the true principle, upon which the admiralty jurisdiction in America depended, was to ascertain how far the river was navigable from the sea; and that consequently, in America, the admiralty jurisdiction extended upon our great rivers not only as far as the tide ebbed and flowed in them, but as far as they were navigable from the sea; as, for example, on the Mississippi and its branches, up to the falls of the Ohio. He also thought that our great lakes at the west were not to be considered as mere inland lakes, but were to be deemed inland navigable seas, and as such were subject, or ought to be subject, to the same jurisdiction." He thus foreshadowed the decision made in 1851 in the case of The Genesee Chief, by which the decision in The Thomas Jefferson was explicitly overruled.

Among the most interesting records of the impression made by Chief Justice Marshall upon his contemporaries are entries written presently after his death (although not published until much later) in the diary of John Quincy Adams, who was then sixty-eight years old; had been a member of either House of Congress; charged with many a diplomatic mission abroad; Secretary of State throughout the administration of President Monroe, and himself President of the United States; had long before been an active member of the bar of the Supreme Court,

and had declined the appointment of Associate Justice, offered him by President Madison before he appointed Mr. Justice Story; and who, as his diary shows, was not given to indiscriminate or excessive laudation.

In that diary, under date of July 10th, 1835, Mr. Adams wrote: "John Marshall, Chief Justice of the United States, died at Philadelphia last Monday, the 4th instant. He was one of the most eminent men that this country has ever produced. He has held this appointment thirty-five years. It was the last act of my father's administration, and one of the most important services rendered by him to his country. All constitutional governments are flexible things; and as the Supreme Judicial Court is the tribunal of last resort for the construction of the Constitution and the laws, the office of Chief Justice of that court is a station of the highest trust, of the deepest responsibility, and of influence far more extensive than that of the President of the United States. John Marshall was a Federalist of the Washington school. The Associate Judges from the time of his appointment have generally been taken from the Democratic or Jeffersonian party." "Marshall, by the ascendency of his genius, by the amenity of his deportment, and by the imperturbable command of his temper, has given a permanent and systematic character to the decisions of the court, and settled many great constitutional questions favorably to the continuance of the Union."

In the same diary, again, a month later, Mr. Adams wrote: "The office of Chief Justice requires a mind of energy sufficient to influence generally the minds of a majority of his associates; to accommodate his judgment to theirs, or theirs to his own; a judgment also capable of abiding the test of time and of giving satisfaction to the public. It requires a man profoundly learned in the law of nations, in the commercial and maritime law, in the civil law, in the common law of England, and in the general statute laws of the several

States of the Union. With all these powers steadily exercised during a period of thirty-four years, Chief Justice Marshall has settled many questions of constitutional law, certainly more than all the Presidents of the United States together."

The late Mr. Justice Bradley, after a distinguished service of nearly twenty years on the bench of the Supreme Court, wrote in 1889 of Chief Justice Marshall as follows: "It is needless to say that Marshall's reputation as a great constitutional judge is peerless. The character of his mind and his previous training were such as to enable him to handle the momentous questions, to which the conflicting views upon the Constitution gave rise, with the soundest logic, the greatest breadth of view, and the most far-seeing statesmanship. He came to the bench with a reputation already established—the reputation not only of a great lawyer, but of an eminent statesman and publicist." "It may truly be said that the Constitution received its final and permanent form from the judgments rendered by the Supreme Court during the period in which Marshall was at its head. With a few modifications, superinduced by the somewhat differing views on two or three points of his great successor, and aside from the new questions growing out of the late civil war and the recent constitutional amendments, the decisions made since Marshall's time have been little more than the application of the principles established by him and his venerated associates."

"The American Constitution as it now stands," says Mr. James Bryce, in his book on The American Commonwealth, "is a far more complete and finished instrument than it was when it came fire-new from the hands of the Convention. It is not merely their work, but the work of the judges, and most of all of one man, the great Chief Justice Marshall." "His work of building up and working out the Constitution was accomplished not so much by the decisions he gave, as by the judgments in

which he expounded the principles of these decisions, judgments which for their philosophical breadth, the luminous exactness of their reasoning, and the fine political sense which pervades them, have never been surpassed and rarely equalled by the most famous jurists of modern Europe or of ancient Rome." "He grasped with extraordinary force and clearness the cardinal idea that the creation of a national government implies the grant of all such subsidiary powers as are requisite to the effectuation of its main powers and purposes; but he developed and applied this idea with so much prudence and sobriety, never treading on purely political ground, never indulging the temptation to theorize, but content to follow out as a lawyer the consequences of legal principles, that the Constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed."

The very greatness and completeness of the work of Chief Justice Marshall tends to prevent our appreciating how great it was.

He was a great statesman, as well as a great lawyer, and yet constantly observed the distinction between law, as judicially administered, and statesmanship.

The Constitution of the United States created a nation upon the foundation of a written constitution; and, as expounded by Marshall, transferred in large degree the determination of the constitutionality of the acts of the legislature or the executive from the political to the judicial department.

Marshall grew up with the Constitution. He served in the legislature of Virginia before and after its adoption, and in the convention of Virginia by which it was ratified. He took part in its administration, abroad and at home, in a foreign mission, in the House of Representatives, and in the Department of State, before he became the head of the judiciary, within a quarter of a century after

the Declaration of Independence, and less than twelve years after the Constitution was established.

During the thirty-four years of his Chief Justiceship he expounded and applied the Constitution, in almost every aspect, with unexampled sagacity, courage and caution.

He had an intuitive perception of the real issue of every case, however complicated, and of the way in which it should be decided.

His manner of reasoning was peculiarly judicial. It was simple, direct, clear, strong, earnest, logical, comprehensive, demonstrative, starting from admitted premises, frankly meeting every difficulty, presenting the case in every possible aspect, and leading to philosophical and profoundly wise conclusions, sound in theory and practical in result. He recognized that, next to a right decision, it was important that reasons for the decision should be fully stated so as to satisfy the parties and the public. And it may be said of him, as Charles Butler, in his Reminiscences, says of Lord Camden, that he sometimes "rose to sublime strains of eloquence: but their sublimity was altogether in the sentiment; the diction retained its simplicity, and this increased the effect."

It was in the comparatively untrodden domain of constitutional law, in bringing acts of the legislature and of the executive to the test of the fundamental law of the Constitution, that his judicial capacity was preëminently shown. Deciding upon legal grounds, and only so much as was necessary for the disposition of the particular case, he constantly kept in mind the whole scheme of the Constitution. And he answered all possible objections with such fulness and such power as to make his conclusions appear natural and inevitable.

The principles affirmed by his judgments have become axioms of constitutional law. And it is difficult to overestimate the effect which those judgments have had in quieting controversies on constitutional questions, and in creating or confirming a sentiment of allegiance to the

Constitution, as loyal and devoted as ever was given to any sovereign.

You will, I hope, forgive me one personal anecdote. While I had the honor to be Chief Justice of Massachusetts, I was a guest of a Boston merchant at a dinner party of gentlemen, which included Mr. Bartlett, then the foremost lawyer of Massachusetts, and one of the leaders at the bar of the Supreme Court of the United States. In the course of the dinner, the host, turning to me, asked, "How great a judge was this Judge Marshall, of whom you lawyers are always talking?" I answered, "The greatest judge in the language." Mr. Bartlett spoke up, "Is not that rather strong, Chief Justice?" I rejoined, "Mr. Bartlett, what do you say?" After a moment's pause, and speaking with characteristic deliberation and emphasis, he replied: "I do not know but you are right."

A service of nearly twenty years on the bench of the Supreme Court has confirmed me in this estimate. We must remember that, as has been well said by an eminent advocate of our own time, Mr. Edward J. Phelps, in speaking of Chief Justice Marshall: "The test of historical greatness—the sort of greatness that becomes important in future history—is not great ability merely. It is great ability, combined with great opportunity, greatly employed." None other of the great judges of England or of America ever had the great opportunity that fell to the lot of Marshall.

John Marshall, during his term of office as Chief Justice, undertook no other public employment, except that, at the beginning of that term, and at the particular request of President John Adams, he continued to hold the office of Secretary of State for the last month of his administration; and that, at seventy-four years of age, and after having been Chief Justice twenty-eight years, he was persuaded to serve as a member of the Virginia convention of 1829–30 to revise the constitution of the State.

At the time of becoming a member of that convention, he wrote to Mr. Justice Story an amusingly apologetic letter, dated Richmond, June 11th, 1829, in which he said: "I am almost ashamed of my weakness and irresolution, when I tell you that I am a member of our convention. I was in earnest when I told you that I would not come into that body, and really believed that I should adhere to that determination; but I have acted like a girl addressed by a gentleman she does not positively dislike, but is unwilling to marry. She is sure to yield to the advice and persuasion of her friends." "I assure you I regret being a member, and could I have obeyed the dictates of my own judgment I should not have been one. I am conscious that I cannot perform a part I should wish to take in a popular assembly; but I am like Molière's *Médecin Malgré Lui.*"

Mr. Grigsby tells us that "he spoke but seldom in the convention, and always with deliberation," and that "an intense earnestness was the leading trait of his manner." Some remarks of his on the judicial tenure may fitly be quoted, without comment.

Strenuously upholding, as essential to the independence of the judiciary, the tenure of office during good behavior, he said: "I have grown old in the opinion, that there is nothing more dear to Virginia, or ought to be dearer to her statesmen, and that the best interests of our country are secured by it. Advert, Sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular." "Is it not, to the last degree, important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? You do not allow a man to perform the duties of a juryman or a judge, if he has one dollar of interest in the matter to be decided; and will you allow a judge to give a decision when his

office may depend upon it? When his decision may offend a powerful and influential man?" "And will you make me believe that if the manner of his decision may affect the tenure of that office, the man himself will not be affected by that consideration?" "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

The question of the weight, as a precedent, of the act of Congress of 1802, abolishing the circuit judgeships created by Congress in 1801, having been discussed by other members of the convention, and Chief Justice Marshall's opinion having been requested, he said, "that it was with great, very great repugnance, that he rose to utter a syllable upon the subject. His reluctance to do so was very great indeed; and he had, throughout the previous debates on this subject, most carefully avoided expressing any opinion whatever upon what had been called a construction of the Constitution of the United States by the act of Congress of 1802. He should now, as far as possible, continue to avoid expressing any opinion on that act of Congress. There was something in his situation, which ought to induce him to avoid doing so. He would go no farther than to say, that he did not conceive the Constitution to have been at all definitively expounded by a single act of Congress. He should not meddle with the question, whether a course of successive legislation should or should not be held as a final exposition of it; but he would say this—that a single act of Congress, unconnected with any other act by the other departments of the Federal Government, and especially of that department more especially entrusted with the construction of the Constitution in a great degree, when there was no union of departments, but the legislative department alone had acted, and acted but once, even admitting that act not to have passed in times of high political and party excitement, could never be admitted as final and conclusive."

A discussion of the merits of his Life of Washington would be out of place on this occasion. But I may mention having been favored with a sight of his letter of November 25th, 1833, accepting the Presidency of the Washington National Monument Society, in which he said: "You are right in supposing that the most ardent wish of my heart is to see some lasting testimonial of the grateful affection of his country erected to the memory of her first citizen. I have always wished it, and have always thought that the metropolis of the Union was the first place for this national monument."

His letter to Delaplaine, containing the autobiography already quoted, contains another passage too characteristic to be omitted: "I received also a letter from you, requesting some expression of my sentiments respecting your repository, and indicating an intention to publish in some conspicuous manner the certificates which might be given by Mr. Wirt and myself. I have been ever particularly unwilling to obtain this kind of distinction, and must insist on not receiving it now. I have, however, no difficulty in saying, that your work is one in which the nation ought to feel an interest, and I sincerely wish it may be encouraged, and that you may receive ample compensation for your labor and expense. The execution is, I think, in many respects praiseworthy. The portraits, an object of considerable interest, are, so far as my acquaintance extends, good likenesses; and the printing is neatly executed with an excellent type. In the characters there is of course some variety. Some of them are drawn with great spirit and justice; some are, perhaps, rather exaggerated. There is much difficulty in giving living characters, at any rate until they shall have withdrawn from the public view." And Mr. Wirt, then Attorney General, wrote a similar letter November 5th, 1818, to Delaplaine.

Marshall was, like Lord Camden and other eminent judges, a great reader of novels. On November 26th,

1826, he wrote to Mr. Justice Story that he had just finished reading Miss Austen's novels, and was much pleased with them, saying: "Her flights are not lofty, she does not soar on eagle's wings, but she is pleasing, interesting, equable and yet amusing."

To his latest years, he retained his love of country life, and his habits of exercise in the open air. He continued to own the family place in Fauquier County, where he had passed his boyhood, and usually visited it in the summer. And he had another farm three or four miles from Richmond, and often walked out or in.

Mr. Binney, in his sketches of the Old Bar of Philadelphia, incidentally mentions: "After doing my best, one morning, to overtake Chief Justice Marshall in his quick march to the Capitol, when he was nearer to eighty than to seventy, I asked him to what cause in particular he attributed that strong and quick step; and he replied that he thought it was most due to his commission in the army of the Revolution, in which he had been a regular foot practitioner for nearly six years."

You would not forgive me, were I to omit to mention the Quoit Club, or Barbecue Club, which for many years used to meet on Saturdays at Buchanan's Spring in a grove on the outskirts of Richmond. The city has spread over the place of meeting, the spring has been walled in and the grove cut down, and the memories of the Club are passing into legend.

According to an account preserved in an article on Chief Justice Marshall in the number for February, 1836, of the Southern Literary Messenger, (which I believe has always been considered as faithfully recording the sentiments and the traditions of Virginia,) the Quoit Club was coëval with the Constitution of the United States, having been organized in 1788 by thirty gentlemen, of whom Marshall was one; and it grew out of informal fortnightly meetings of some Scotch merchants to play at quoits.

Who can doubt that, if those Scotchmen had only introduced their national game of golf, the Chief Justice would have become a master of that game?

There are several picturesque descriptions of the part he took at the meetings of the Quoit Club. It is enough to quote one, perhaps less known than the others, in which the artist, Chester Harding, visiting Richmond during the session of the State convention of 1829–30, when the Chief Justice was nearly seventy-five years old, and the last survivor of the founders of the Club, tells us: "I again met Judge Marshall in Richmond, whither I went during the sitting of the convention for amending the constitution. He was a leading member of a quoit club, which I was invited to attend. The battle-ground was about a mile from the city, in a beautiful grove. I went early, with a friend, just as the party were beginning to arrive. I watched for the coming of the old chief. He soon approached with his coat on his arm, and his hat in his hand, which he was using as a fan. He walked directly up to a large bowl of mint-julep, which had been prepared, and drank off a tumbler full of the liquid, smacked his lips, and then turned to the company with a cheerful 'How are you, gentlemen?' He was looked upon as the best pitcher of the party, and could throw heavier quoits than any other member of the club. The game began with great animation. There were several ties; and, before long, I saw the great Chief Justice of the Supreme Court of the United States down on his knees, measuring the contested distance with a straw, with as much earnestness as if it had been a point of law; and if he proved to be in the right, the woods would ring with his triumphant shout."

In the summer and autumn of 1831, the Chief Justice had a severe attack of stone, which was cured by lithotomy, performed by the eminent surgeon, Dr. Physick, of Philadelphia, in October, 1831. Another surgeon, who assisted at the operation, tells us that his recovery

was in a great degree owing to his extraordinary self-possession, and to the calm and philosophical views which he took of his case, and of the various circumstances attending it. Just before the operation, he wrote to Mr. Justice Story: "I am most earnestly attached to the character of the department, and to the wishes and convenience of those with whom it has been my pride and my happiness to be associated for so many years. I cannot be insensible to the gloom which lowers over us. I have a repugnance to abandoning you under such circumstances, which is almost invincible. But the solemn convictions of my judgment, sustained by some pride of character, admonish me not to hazard the disgrace of continuing in office a mere inefficient pageant." He concluded by saying that he had determined to postpone until the next term the question whether he should resign his office. After the operation, he wrote: "Thank Heaven, I have reason to hope that I am relieved. I am, however, under the very disagreeable necessity of taking medicine continually to prevent new formations. I must submit, too, to a severe and most unsociable regimen. Such are the privations of age." He continued to perform the duties of his office, with undiminished powers of mind, for nearly four years more, and ultimately died, in his eightieth year, of a disease of a wholly different character, an enlarged condition of the liver.

There are many testimonies to his great modesty, self-effacement and true humility, in any company, whether of friends or of strangers. Let me quote but one, recently made known to me by the kindness of the President of your Supreme Court of Appeals, (a kinsman of Chief Justice Marshall,) and which, with his permission, is given in his own words: "I have an aunt in Fauquier County, Miss Lucy Chilton, now in her ninety-first year. I asked her on one occasion if she had known Judge Marshall. She replied that she had spent weeks

at a time in the same house with him. I then asked her what trait or characteristic most impressed her. She replied without hesitation: 'His humility. He seemed to think himself the least considered person in whatever company he chanced to be.'" This quality in him may help us to understand the saying, that the great lawgiver and judge of the Hebrews—who, we are told, "was learned in all the wisdom of the Egyptians, and was mighty in words and in deeds"—was "very meek, above all men which were upon the face of the earth."

Chief Justice Marshall was a steadfast believer in the truth of Christianity, as revealed in the Bible. He was brought up in the Episcopal Church; and Bishop Meade, who knew him well, tells us that he was a constant and reverent worshipper in that church, and contributed liberally to its support, although he never became a communicant. All else that we know of his personal religion is derived from the statements (as handed down by the good bishop) of a daughter of the Chief Justice, who was much with him during the last months of his life. She said that her father told her he never went to bed without concluding his prayer by repeating the Lord's Prayer and the verse beginning, "Now I lay me down to sleep," which his mother had taught him when he was a child; and that the reason why he had never been a communicant was that it was but recently that he had become fully convinced of the divinity of Christ, and he then "determined to apply for admission to the communion of our church—objected to commune in private, because he thought it his duty to make a public confession of the Saviour—and, while waiting for improved health to enable him to go to the church for that purpose, he grew worse and died, without ever communing."

His private character cannot be more felicitously or more feelingly summed up than in the resolutions drawn up by Mr. Leigh, and unanimously adopted by the Bar of

this Circuit, soon after the death of the Chief Justice: "His private life was worthy of the exalted character he sustained in public station. The unaffected simplicity of his manners; the spotless purity of his morals; his social, gentle, cheerful disposition; his habitual self-denial, and boundless generosity towards others; the strength and constancy of his attachments; his kindness to his friends and neighbors; his exemplary conduct in the relations of son, brother, husband, father; his numerous charities; his benevolence towards all men, and his ever active beneficence; these amiable qualities shone so conspicuously in him, throughout his life, that, highly as he was respected, he had the rare happiness to be yet more beloved."

Let me add a few words from the address of Mr. William Maxwell before the Virginia Historical and Philosophical Society on March 2d, 1836, preserved in the Southern Literary Messenger: "He came about amongst us, like a father amongst his children, like a patriarch amongst his people—like that patriarch whom the sacred Scriptures have canonized for our admiration—'when the eye saw him, it blessed him; when the ear heard him, it gave witness to him; and after his words men spake not again.'"

The earliest and most lifelike description that we have of his face and figure is one given by the kinsman who was present on the occasion, already mentioned, of his taking command of a militia company in 1775, when not quite twenty years of age: "He was about six feet high, straight and rather slender; of dark complexion, showing little if any rosy red, yet good health; the outline of the face nearly a circle, and, within that, eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature; an upright forehead, rather low, was terminated in a horizontal line by a mass of raven-black hair of unusual thickness and strength; the features of the face were in harmony with this outline, and the temples

fully developed; the result of this combination was interesting and very agreeable. The body and limbs indicated agility rather than strength, in which, however, he was by no means deficient." A few words more may be quoted, completing the picture: "He wore a purple or pale-blue hunting-shirt, and trousers of the same material fringed with white. A round black hat, mounted with the bucks-tail for a cockade, crowned the figure and the man."

"This is a portrait to which," adds Mr. Binney, "in everything but the symbols of the youthful soldier, and one or two of those lineaments which the hand of time, however gentle, changes and perhaps improves, he never lost his resemblance. All who knew him well will recognize its truth to nature."

Of all the portraits by various artists, that which best accords with the above description, especially in the "eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature," is one by Jarvis, (perhaps the best American portrait painter of his time, next to Stuart,) which I have had the good fortune to own for thirty years, and of which, before I bought it, Mr. Middleton, then the clerk of the Supreme Court, who had been deputy clerk for eight years under Chief Justice Marshall, wrote me: "It is an admirable likeness; better than the one I have, which has always been considered one of the best." This portrait was taken while his hair was still black, or nearly so; and, as shown by the judicial robe, and by the curtain behind and above the head, was intended to represent him as he sat in court.

The most important of the later portraits are those painted by Harding in 1828–30, and by Inman in 1831, with a graver expression of countenance, with the hair quite gray, and with deep lines in the face.

Harding's portraits were evidently thought well of, by the subject, as well as by the artist. One of them, after-

wards bequeathed by Mr. Justice Story to Harvard College, was sent to him by the Chief Justice in March, 1828, with a letter saying, "I beg you to accept my portrait, for which I sat in Washington to Mr. Harding, to be preserved when I shall sleep with my fathers, as a testimonial of sincere and affectionate friendship;" and in the same letter he gave directions for paying Harding "for the head and shoulders I have bespoke for myself." Harding's principal portrait of Marshall was painted in 1830 for the Boston Athenæum, in whose possession it still is; it has the advantage of being a full length, showing that in his seventy-fifth year he retained the erect and slender figure of his youth; and the artist wrote of it in his autobiography: "I consider it a good picture. I had great pleasure in painting *the whole* of such a man."

Inman's careful portrait, in the possession of the Philadelphia Law Association, has often been engraved, and is perhaps the best known of all.

The crayon portrait in profile, drawn by St. Memim in 1808, which has always remained in the family of the Chief Justice, and been considered by them an excellent likeness, and is now owned by a descendant in Baltimore; the bust by Frazee, bequeathed by Mr. Justice Story to Harvard College, and familiarly known by numerous casts; and that executed by Powers, by order of Congress, soon after the Chief Justice's death, for the Supreme Court Room—all show that, while his hair grew rather low on the forehead, his head was high and well shaped, and that, as was then not unusual, he wore his hair in a queue.

His dress, as shown in the full length portrait by Harding, and as described by his contemporaries, was a simple and appropriate, but by no means fashionable, suit of black, with knee breeches, long stockings, and low shoes with buckles.

You may think, my friends, that I have been led on to spend too much time in endeavoring to bring before you

the bodily semblance of the great Chief Justice. Yet you must admit, as he did in his letter to Delaplaine, that portraits of eminent men are "an object of considerable interest."

But, after all, it is not the personal aspect of a great man, it is his intellect and his character, that have a lasting influence on mankind. *Ut vultus hominum, ita simulacra vultus imbecilla ac mortalia sunt. Forma mentis æterna; quam tenere et exprimere, non per alienam materiam et artem, sed tuis ipse moribus possis.*

Brethren of the Bar of the Old Dominion; Fellow-citizens of the United States:

To whatsoever professional duty or public office we may any of us be called, we can find, in the long line of eminent judges with whom Almighty Providence has blessed our race, no higher inspiration, no surer guide, than in the example and in the teachings of JOHN MARSHALL.

SUPREME COURT DECISIONS REFERRED TO.

Bank of United States *v.* Deveaux (1809) 5 Cranch, 61.
Bollman & Swartwout, ex parte (1807) 4 Cranch, 75.
Boyle *v.* Zacharie (1832) 6 Peters, 348, 635.
Brown *v.* Maryland (1827) 12 Wheaton, 419.
Chisholm *v.* Georgia (1793) 2 Dallas, 419.
Cohens *v.* Virginia (1821) 6 Wheaton, 264.
Dartmouth College *v.* Woodward (1819) 4 Wheaton, 518.
Elmendorf *v.* Taylor (1825) 10 Wheaton, 152.
The Exchange (1812) 7 Cranch, 116.
Fletcher *v.* Peck (1810) 6 Cranch, 87.
The Genesee Chief (1851) 12 Howard, 443.
Gibbons *v.* Ogden (1824) 9 Wheaton, 1.
Hans *v.* Louisiana (1890) 134 United States, 1.
Hollingsworth *v.* Virginia (1798) 3 Dallas, 378.
Hope Insurance Company *v.* Boardman (1809) 5 Cranch, 57.
Hylton *v.* United States (1796) 3 Dallas, 171.
Louisville Railroad Company *v.* Letson (1844) 2 Howard, 497.
McCulloch *v.* Maryland (1819) 4 Wheaton, 316.
Marbury *v.* Madison (1803) 1 Cranch, 137.
Martin *v.* Hunter's Lessee (1816) 1 Wheaton, 304.
Ogden *v.* Saunders (1827) 12 Wheaton, 213.
Osborn *v.* Bank of United States (1824) 9 Wheaton, 738.
Stuart *v.* Laird (1803) 1 Cranch, 299.
Sturges *v.* Crowninshield (1819) 4 Wheaton, 122.
The Thomas Jefferson (1825) 10 Wheaton, 428.
United States *v.* Peters (1809) 5 Cranch, 115.
——— ——— *v.* Wiltberger (1820) 5 Wheaton, 76.
Ware *v.* Hylton (1796) 3 Dallas, 199.

AUTHORITIES CONSULTED, OTHER THAN SUPREME COURT DECISIONS.

Adams, John. Works, vol. ix. Boston, 1854.

Adams, John Quincy. Memoirs, vols. viii, ix. Philadelphia, 1876.

Binney, Horace. Eulogy on Marshall. Philadelphia, 1835.

——— ——— Old Bar of Philadelphia. p. 83. Philadelphia, 1859.

Bradley, Joseph P. St. Memim's Portrait of Marshall. Century Magazine of September, 1889. New York, 1889.

Bryce, James. The American Commonwealth. London, 1888.

Burr, Aaron. Trial. Robertson's Report; Philadelphia, 1808.

Butler, Charles. Reminiscences. vol. i, (4th ed.) p. 133. London, 1824.

Carson, Hampton L. The Supreme Court of the United States. (2d ed.) Philadelphia, 1892.

Cooley, Thomas M. The Federal Supreme Court. Lecture at University of Michigan in 1889. New York, 1890.

Flanders, Henry. Lives of the Chief Justices. Philadelphia, 1881.

Gibbs, George. Administrations of Washington and John Adams, vol. ii, p. 314. New York, 1846.

Grigsby, Hugh B. Discourse on Virginia Convention of 1829–30. Richmond, 1853.

Harding, Chester. Autobiographical Sketch. Cambridge, 1866. Boston, 1890.

Henry, Patrick. Life by William Wirt Henry. New York, 1891.

Hitchcock, Henry. Constitutional Development of the United States as influenced by Marshall. Lecture at University of Michigan in 1889. New York, 1890.

Hopkinson, Joseph. Memoir of Marshall. Brockenbrough's Reports of Marshall's Decisions in Circuit Court, vol. i, p. ix. Philadelphia, 1837.

Jay, John. Life by William Jay. New York, 1833.

—— —— Life by George Pellew. Boston, 1890.

Law Reports, Probate Division. vol. v, pp. 197, 208. London, 1880.

Magruder, Allan B. Life of Marshall. Boston, 1885.

Marshall, John. Letters to John Adams. In possession of Adams Family at Quincy. MSS.

——— ——— Letters to William Cushing. In possession of General Charles J. Paine of Boston. MSS.

——— ——— Letter to James Delaplaine. Columbus, Ohio; published by J. H. Riley & Co., 1848.

——— ——— Letters to Joseph Story. Massachusetts Historical Society Proceedings. November, 1900.

——— ——— Life of Washington. Philadelphia, 1804–7; (2d ed.) Philadelphia, 1833.

——— ——— Speech in Congress on Case of Jonathan Robbins. Philadelphia, 1800. Wheaton's Reports of Cases in Supreme Court, vol. v, appendix; New York, 1820.

Meade, William. Old Churches and Families of Virginia. vol. i, p. 30; vol. ii, pp. 216–224. Philadelphia, 1872.

New York Review. Article on Marshall. vol. iii, p. 328. New York, 1838.

Phelps, Edward J. Address on Marshall. Philadelphia, 1879. American Bar Association Reports, vol. ii.

Physick, Philip S. Memoir by J. Randolph, M. D. pp. 96–101. Philadelphia, 1839.

Rawle, William H. Oration on Unveiling of Marshall's Statue. United States Reports, vol. cxii, appendix.

Senate Executive Journal, 1789–1837. Washington, 1828–87.

Southern Literary Messenger. Articles on Marshall. vol. ii, pp. 183, 258, 260, 317. Richmond, 1836.

State Department. Commissions. 1789–1836. MSS.

Story, Joseph. Article on Marshall. North American Review of January, 1828. Boston, 1828.

——— ——— Biography of Marshall. National Portrait Gallery of Distinguished Americans, vol. i, pt. iii. Philadelphia, 1833–34. Story's Miscellaneous Writings; Boston, 1835.

——— ——— Commentaries on the Constitution of the United States. Boston, 1833.

——— ——— Discourse on Marshall. Boston, 1835. Story's Miscellaneous Writings; Boston, 1852.

——— ——— Life and Letters by William W. Story. Boston, 1851.

Taney, Roger B. Life by Samuel Tyler. Baltimore, 1872.

Tucker, St. George. Edition of Blackstone's Commentaries. vol. i, pt. i, appendix, p. 294. Philadelphia, 1803.

Van Santvoord, George. Lives of the Chief Justices. (2d ed.) Albany, 1882.

Virginia Bar. Resolutions on Marshall's Death. Brockenbrough's Reports of Marshall's Decisions in Circuit Court, vol. i, p. xvii. Philadelphia, 1837.

Virginia Convention on Federal Constitution, 1788. Petersburg, 1788. 3 Elliot's Debates, (2d ed.) Washington, 1836.
——— ——— on State Constitution, 1829–30. pp. 616, 619, 871, 872. Richmond, 1830.
Waite, Morrison R. Address on Unveiling of Marshall's Statue. United States Reports, vol. cxii, appendix.
Washington, George. Writings. (Sparks's ed.) vol. x; Boston, 1836. (Ford's ed.) vol. xi; New York, 1891.
Wirt, William. Letters of a British Spy. Richmond, 1803; (10th ed.) New York, 1832.
——— ———. Life by John P. Kennedy. Philadelphia, 1849.